Order 46 rule 7, so far as is material, provides as follows:

"Payment by sheriff to execution creditor.

7. Subject to the provisions of Order 46A... the sheriff shall, at the expiration of fourteen days after the execution of sale of any writ of seizure and sale, pay to the execution creditor the balance of the proceeds of sale in his hands (after deduction of his fees, commission and expenses) or so much thereof as is necessary to satisfy the judgment in respect of which execution was issued."

It is to be observed that our Order 46A is modelled on section 73 of the Indian Civil Procedure Code.

On an examination of the above provisions it becomes clear that the primary condition to be fulfilled by a person claiming to participate in the assets of the judgment-debtor, is that he must have had a decree for the payment of money, which has been obtained by him against the same judgment-debtor.

It is, however, conceded before the court on behalf of counsel for the respondent that the applicants have each of them satisfied the above conditions.

Thereupon it becomes the duty of the court by which the assets are held, to allow the decree-holders to participate in the distribution equally with the decree-holders who obtained the decrees against the judgment-debtor upon which the execution proceedings are instituted.

The object of the Order is fairly clear, namely, to prevent multiplicity of execution proceedings and at the same time to ensure that there was equitable distribution of the assets of the judgment-debtor among the various decree-holders who have the right to have their decrees satisfied.

As it now stands the provisions of Order 46A are to my mind simply designed to facilitate the expedient administration of assets of the judgment-debtor.

It is, therefore, apparent that the point of procedure raised by counsel for the respondent is a mere technical point devoid of merit.

I will refer to the brief passage in the judgment of *Hoti Lal* v. *Chatura Prasad and Others*[1] where it says:

"It cannot be disputed that section 73 enacts a mere rule of procedure and not a rule of substantive law."

It is perhaps convenient to refer to *Chitaley & Rao* in their commentary in regard to the scope and object of the provisions of the law as set out in section 73, Civil Procedure Code, on the question of priority and application:—

"Under sections 270 and 271 of the Code of 1859 which corresponded to the present section 73, the creditor who first attached the property had a statutory priority to have his claim satisfied in full out of the sale proceeds to the exclusion of other creditors. This superior position assigned to the first attaching creditor naturally led to scrambles and malpractices among attaching creditors, and, with a view to put an end to the same, the section was changed by the Code of 1877 so as to place all decree-holders on an equal footing regardless of any priority in attachment or of the application for rateable distribution."

(See *Nathmal* v. *Zindamal Sultanmal*[2]).

So also in *Suikeena Katum Sahiba* v. *Mohamed Abdul Aziz*[3] it was decided that an application for execution of a decree did not give priority by virtue of attachment by a creditor and that the fund in a court which was attached was distributable on the principle followed by a court in the administration of assets of a deceased person, that is to say, rateably amongst the creditors who put in claims thereto.

The court has been referred to a passage in *Mallal's* Supreme Court Practice, Volume 1, at page 641 under the heading "English and Local Procedure" where Dr. Bashir A. Mallal observed:

"When the local law has been modelled on that of India, Indian decisions are important. *Leonard* v. *Nachiappa Chetty* (1923) 4 F.M.S.L.R. 265".

Finally, I come to the question of procedural technicalities where the learned editor of *The Malayan Law Journal* has this to say at page lxiii of [1969] 2 M.L.J.:

"While the lawyers in England have improved their own machinery of procedure we still continue to use their old procedure. It is time that a serious look should be taken at our rules of procedure so that in the words of Ismail Khan J., as he then was, in *Ee Kim Kin* v. *Collector of Land Revenue, Alor Gajah*, [1967] 2 M.L.J. 89: 'Rules of procedure should be the hand-maiden not the master'. We may be pardoned for repeating what Kaikaus J. said in *Imtiaz Ahmad* v. *Ghulam Ali*[4] at page 400 [noted at [1963] M.L.J lxii]:

'... I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his'."

I therefore make the order as asked for in terms of the summons in chambers, *i.e.* the assets of the judgment-debtor be rateably distributed among the decree-holders.

Order accordingly.

RE COLISEUM STAND CAR SERVICE LTD. ABDUL KHALIK v. MOHAMED JEE & ORS.

[O.C.J. (Abdul Hamid J.) August 21, 1971]

[Kuala Lumpur — Originating Motion No. 9 of 1967]

Companies — Oppression of minorities — Conduct of affairs of company — Court's power to regulate — Companies Act, 1965, s. 181(1) and (2).

Practice and Procedure — Application under Companies Act, 1965, s. 181 — Whether by way of originating motion or petition — Nature of relief sought — Necessity to state in clear terms.

An application under section 181 of the Companies Act may be proceeded by way of originating motion. Such an application must state the nature of the relief sought and satisfy the court that the applicant is entitled to that relief.

In this case it was established that the first respondent, the majority shareholder in the company, had conducted the affairs of the company without proper regard to the applicant's interest.

Held: (1) the act of the first respondent constituted an oppression on minority shareholders;

(2) the applicant was entitled to a relief, but that relief should be aimed at bringing an end to or remedying the matters complained of.

Cases referred to:-

(1) *Re Meister Lucius & Bruning Ltd.* [1914] W.N. 390.

(2) *Re S.A. Hawken Ltd.* [1950] 2 All E.R. 408 at p. 409.

ORIGINATING MOTION.

S. D. K. Peddie for the applicant.

K. A. Menon for the first and third respondents.

Kirpal Singh Brar for the second respondent.

Cur. Adv. Vult.

Abdul Hamid J.: This is an application by Abdul Khalik one of the shareholders of Coliseum Stand Car Service Limited (hereinafter referred to as "the company") incorporated in Malaya in 1939 under the Companies Enactment Cap. 58 having its registered office at 83, Jalan Tuanku Abdul Rahman, Kuala Lumpur. One of the objects of the company is to control, manage and operate motorcars as taxies for hire or reward.

At the date of this application, the applicant holds 1,364 shares, the first respondent 10,909 shares and Said Jand (f) (as administratrix) 2,727 shares. The nominal capital of the company is $15,000 divided into 15,000 shares.

It is averred by the applicant that the company was solely run by the first respondent. The first respondent, on the other hand, alleged that the applicant was first elected director at the 9th Annual General Meeting held on 29th December, 1947 in the office of Messrs. Law & Company. At this meeting the applicant consented to such appointment. The applicant denied that he consented to act or purported to act as director. He also denied that he attended any directors' meeting. According to him notices of such meeting were not issued to him.

The applicant further averred that at the purported general meetings, only the first and the second respondents were present. An attempt made by him to attend one of these meetings resulted in a fight between himself and the first respondent over the conduct of the company's affairs. As a result, he was obliged to leave the meeting and since 1950, he had not attended the meetings.

At the hearing of the motion, the first respondent called one Lee Chuen Moon, a secretary to the Coliseum Stand Car Service. He testified that he was the company's secretary since 1951. He attended all board meetings as well as annual general meetings and recorded minutes of these meetings (see minute book D1). He stated that the applicant signed the minute book whenever he was present. The notices of the annual general meetings were sent to the applicant. Under cross-examination by Mr. Peddie counsel for the applicant, Mr. Lee at first said that he had seen the consent by the applicant to act as director but subsequently agreed that there was no consent complying with section 147 of the Companies Ordinance, 1940

According to the applicant, the second respondent expressed dissatisfaction over the conduct of the company's affairs. Her objections were fruitless because the voting power of the first respondent exceeds the combined voting powers of the applicant and the second respondent. It is alleged that all the proposals made by the first respondent were carried out by virtue of such voting power, and these proposals were detrimental to the company and the other shareholders.

Referring to the notice of the annual general meeting to be held on 21st December, 1966. it is averred that the first respondent signed the report accompanying the said notice purporting that the report was signed by the directors of the company. It is also averred that this report did not comply with section 169 (5) of the Companies Act, 1965 nor with sections 169 (6) and 169 (9) and the balance sheet which accompanied the report did not comply with section 169 (11), (12) and (13) of the said Act. The applicant contended that by reason of these defects, the meeting could not be held nor can it be held in the future unless these defects are cured.

As regards the dividend of 200% paid in 1965, it is alleged that this was declared without the authority of the directors and without the sanction of any meeting of the company but was solely authorised by the first respondent. Furthermore it was only declared after the second respondent's solicitors had sent a letter to the company. No dividend was declared in the other years. This fact, he said, indicates that the affairs of the company were being managed by the first respondent entirely for his own benefit.

According to the first respondent, this was an interim dividend declared by the company from funds which accumulated from the previous years, that is, from 1959 to 1963. He did not deny that previously the company did not declare any dividend although during the years 1959 to 1963, the company showed a credit balance.

Referring to director's fee, it is averred by the applicant that the first respondent was receiving it from 1959 to 1963 at the rate of $6,000 *per annum*. This was increased to $7,200 in 1964 and $8,400 *per annum* in 1965. This is admitted by the first respondent.

The applicant also referred to a loan of $3,242.90 from the company's funds by the first respondent. He alleged that there was no approval for this loan and contended that the first respondent had appropriated the funds of the company without authority.

In this regard the first respondent stated that this sum has now been repaid. Nonetheless the court will still have to consider whether there had been an improper use of the company's funds by the first respondent.

The applicant affirmed that when the first respondent was absent from Malaya for 3½ years — from 1959 to 1963 — Mohamed Sharoff the son of the first respondent was appointed without the approval of the directors of the company to manage the business receiving a salary of $5,500 *per annum*. It is alleged that this payment was made without the approval of the directors of the company. It is further affirmed that the first respondent also continued to receive director's fee.

The applicant also averred that a loan of $12,266.36 was made to Mohamed Sharoff in 1963 and 1964 without the company's or the directors' approval. The first respondent did not deny that Mohamed Sharoff was given the loan by the company. He however said that this sum had been repaid.

Referring to the shophouse used by the company as business premises, the applicant alleged that though the first floor was let out, the rents received were never disclosed. The first respondent explained that originally he was the landlord of the first floor while the company occupied the ground floor. Subsequently the company rented the whole of the premises paying a rent of $1,224 *per annum* from April, 1955 to December, 1958. From January, 1959 to March, 1961, a monthly rent of $120 and from April, 1962, $144.40 was paid.

These briefly are the facts disclosed. Before I proceed to make any finding of fact, I shall first of all deal with the submission made by Mr. Menon counsel for the first respondent. He submitted that these proceedings should be by way of petition and not by way of originating motion and that as such the proceedings are misconceived and they should be struck out.

This application is made under section 181 of the Companies Act, 1965 (similar to section 186 of the Australian Companies Act) which states that:

"Any member ... of a company may apply to the court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members ... including himself or in disregard of his or their interests as members, shareholders ... of the company;"

Section 181 does not seem to specify the form of the application. The practice under section 186 of the Australian Companies Act, however is to seek relief upon a petition, although no specific form was provided. Section 186 of the Australian Companies Act is somewhat similar to section 210 of the English Companies Act except that under section 210 of the English Companies Act, it is specifically provided that the application shall be upon a petition. Despite the practice adopted in Australia, I am inclined to think that the application under our section 181 may nevertheless be proceeded by way of originating motion (see *Re Meister Lucius & Bruning, Limited*[1]).

Section 181 may also be distinguished from section 217 which deals with the application for winding-up where the section specifically provided that a company may be wound up under an order of the court upon a petition.

Mr. Menon also submitted that the applicant is seeking the order on his own behalf and on behalf of the second respondent. The second respondent has not filed an affidavit and there is nothing to indicate that she is a party to the claim. If she is asking for all or any of the orders sought, then she must appear as a co-applicant and not as a respondent.

Mr. Kirpal Singh Brar counsel appearing for the second respondent did state at the commencement of the hearing that the second respondent was supporting the application, nevertheless it seems clear that, for purposes of this application, the second respondent has not herself specifically indicated the nature of the relief sought. It would appear that under the law (see page 447 of Australian Company Law by *Peterson and Ednie* under the heading of "Relief sought in petition") —

"The petition ought to state in clear terms the general nature of the relief sought: *Re: Antigen Laboratories Ltd.*, [1951] 1 All E.R. 110. '[We] have not been constituted an earthly providence in matters of this kind and it is for the petitioners to state what they primarily want...': see *per* Lord Cooper in *Meyer* v. *Scottish Textile & Manufacturing Co.* [1954] S.L.T. 273; [1954] S.C. 381 at p. 388."

In the present application it is clear that the applicant is also seeking relief on behalf of the second respondent. In that event he ought to have applied jointly with the second respondent. Considering the fact that the second respondent had full knowledge of the nature of the relief sought and intended to support the application, then the proper thing for her to do was to apply for an order that she be made a co-applicant. She must then state the nature of the relief sought and satisfy the court that she is entitled to that relief.

Referring to the application Mr. Menon submitted that to succeed under section 181, the applicant must establish to the satisfaction of the court that one of the two grounds of complaint as set out under section 181 (1) exists. It is further submitted that the court can only come to the proper conclusion after hearing the evidence of the parties concerned and ought not to grant relief on mere affidavits alone.

I am fully conscious of the fact that it may not be quite proper for the court to decide questions of fact merely on affidavits. Wynn-Parry J. in *Re S. A. Hawken Ltd.*[2] said:

"I can imagine few cases of petitions presented under s. 210 (which corresponds to our s. 181) in which it would be wise or even possible, to rely on the statutory affidavit."

However, in the present proceedings, the court also had the benefit of the applicant's oral testimony. The applicant was cross-examined at the hearing of this motion. Furthermore, there was also the testimony of a witness Lee Chuen Moon called by the first respondent.

Reading the affidavits and after considering the evidence given by the applicant and Lee Chuen Moon, I am of the opinion that there is sufficient evidence to show that the first respondent has not given proper regard to the applicant's interests in the manage-

ment of the company's affairs. Though there was an attempt to show that the applicant was appointed a director of the company suggesting thereby that the applicant himself was a party to any decision taken by the company, I am however unable to conclude that the applicant subsequently consented to act as director even though he may initially have agreed to accept the appointment. It seems clear the applicant had not attended any of the subsequent meetings. The court cannot conclude and indeed there is nothing to show that during the subsequent years, particularly after 1953, he consented to remain as director. The minute book (D1) clearly indicates that the only persons present were the first and second respondents. By reason of the majority shares held by the first respondent, it can hardly be doubted that he was in a position to manage the company's affairs as though he was the sole shareholder. The first respondent admitted that no dividend was declared until 1965 although the company showed a credit balance in the years 1959 to 1963. He explained that he had more to gain by declaring the dividend. That is true but it cannot be ignored that the first respondent was receiving a regular monthly salary of $500 (subsequently increased to $700) for managing the company — even during his 3½ years absence.

It is also apparent that the first respondent had freely exercised the authority as though he alone was the shareholder when he appointed his own son as manager and paid him a monthly salary of $500.

As regards the two loans, one to himself and the other to his son, although it would appear that they had been repaid, there is nothing to show that these loans were made for the benefit of the company. To my mind it constituted an improper use of the company's funds. It was quite improper for the company, controlled entirely by the first respondent, to authorise the use of the company's funds for a purpose unconnected with the company's affairs.

On the evidence before me, it would also appear that the first respondent has not adequately disclosed the circumstances relating to the renting of the first floor of the premises. If it was rented out, where are the rents received? If they had not been rented out then it is for him to show that it was used either by or for the benefit of the company.

In the circumstances of this particular case, I think the applicant has established to my satisfaction that the first respondent had conducted the affairs of the company without proper regard to his (applicant's) interests. To my mind it is not unreasonable to hold that it constituted an oppression on minority shareholders.

Under section 181(2) it is provided that —

"If on such application the court is of the opinion that either of such grounds is established the court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may —
(a) direct or prohibit any act or cancel or vary any transaction or resolution;
(b) regulate the conduct of the affairs of the company in future;
(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
(e) provide that the company be wound up."

The applicant in seeking relief is asking the court to order the first respondent to transfer to him and Said Jand the whole of the shares held by the first respondent as at the 31st day of December, 1965. First, I do not think that the court in exercising its discretion should order the appropriation of all the shares held by the major shareholder. To make an order in terms prayed would in effect amount to ordering complete removal of the first respondent as shareholder of the company. I do not think that the court is justified in ordering that the whole of the shares held by the first respondent be purchased by the minority shareholders. The applicant is, to my mind entitled to a relief but that relief should be aimed at bringing an end or remedying the matters complained of. I am of the opinion that to remove the first respondent's absolute control over the management of the company's affairs I should order the transfer of some of the shares held by him. Presently the applicant and the second respondent hold a total of 4,091 shares, the first respondent 10,909 a majority of 6,818 shares. To remedy the situation, it would not be unreasonable to order and I do hereby order that 4,900 out of the 10,909 shares held by the first respondent be purchased by the applicant, first and second respondents, each of the 4,900 shares to be held jointly by all the three. The purpose of the order is to effect a joint management of the affairs of the company.

As the exact assets and liabilities of the company are not known, I am unable to determine the value of the shares and the purchase price of the shares. In the circumstances I am ordering that an accountant approved by the Senior Assistant Registrar be appointed to prepare an up-to-date statement of accounts of the company's assets and liabilities. The accountant shall also include a report stating what in his assessment is the current value of each share. The accountant's fee shall be paid out of the company's funds. The report shall be submitted within six weeks from the date of the appointment of the accountant. Any further order including an order as to costs shall be made by this court after the submission of the report and the statement of accounts.

Order accordingly.

Solicitors: *Skrine & Co.; K. A. Menon & Co; B. Kaher & Kirpal Singh Brar.*